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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

Brief Of Respondents In Opposition To Petition For Certiorari.

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The respondents respectfully urge this Court to deny the petition of John B. Schlosser for a writ of certiorari.

JURISDICTION.

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (a) (1). The jurisdiction of this Court was invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED.

Did the Court of Appeals sanction such a departure by the District Court from the accepted and usual course of judicial procedure as to require an exercise of this Court's power of supervision?

STATEMENT.

On September 30, 1954, petitioner, voluntarily resigned from the employ of the corporate respondent after 29 years of service. Nearly two years later, at the age of 54, on September 7, 1956, he applied to the company for a service annuity (R. 79). On October 3, 1956, petitioner was informed that under the non-contributory pension plan of the company an employee was entitled to a disability retirement only after competent doctors stated that he was unable to perform any services, and that since this was not true in his case, he was not entitled to an annuity (R. 14).

Petitioner filed this action on April 30, 1957, asserting that he was entitled to a service annuity of not less than One Hundred Thirty-Seven and 77/100 Dollars ($137.77) per month from September 30, 1954, to April 30, 1957, and asking a judgment for not less than Four Thousand Two Hundred Seventy and 95/100 Dollars ($4,270.95), with interest; plus a judgment for such additional amount at the same rate as might become due between May 1, 1957, and the date of judgment; and an order on respondents to pay petitioner not less than One Hundred Thirty-Seven and 77/100 Dollars ($137.77) per month after the date of judgment for petitioner's lifetime.

On May 10, 1957, petitioner filed amendments to his complaint adding a second count purporting to be a class action seeking a construction, modification and alteration of the company's service annuity plan.

Petitioner demanded a trial by jury.

On May 21, 1957, petitioner served notice that he would seek a preliminary injunction compelling payment of the claimed annuity beginning at once. He also served a *subpoena duces tecum* on the secretary of the company returnable on May 24, 1957, demanding production of a quantity of books and records (R. 25).

The respondents promptly moved to quash the *subpoena duces tecum* (R. 24). Nevertheless respondents furnished to counsel for the petitioner copies of most of the documents sought, including the whole of the company file as to petitioner, and promised to furnish him additional material (R. 44-45). On June 10, 1957, the district court quashed the *subpoena duces tecum* with respect to the remaining items sought (R. 42).

On June 13, 1957, respondents filed their answer to the complaint as amended denying any liability to the petitioner and asserting that the complaint did not state a cause of action.

On June 17, 1957, respondents filed an answer to the motion for preliminary injunction incorporating their answer to the complaint, asserting that the petitioner did not set forth sufficient grounds to warrant issuance of a preliminary injunction, and denying the bulk of the allegations contained in the motion for preliminary injunction (R. 81).

Though not shown by the record since they were never filed by petitioner, on June 26, 1957, he served a notice and motion on counsel for respondents asking the court to strike that answer, to fix an immediate date for hear-

ing on petitioner's motion for preliminary injunction and to assess against respondents legal fees "due to defendant's dilatory tactics". After serving the notice of motion counsel for petitioner advised counsel for respondents orally that the motion would not be presented, and it was not presented to the court. Again on July 15, 1957, another motion and notice were served on counsel for respondents asking that the company be held in contempt for alleged failure to produce certain books and records covered by the *subpoena duces tecum* and to require the company to pay attorney's fees to petitioner's counsel. As before this motion was not presented to the court on the date set in the notice.

Instead, on July 23, 1957, counsel for respondents were again served with a notice of motion to be presented on July 24, 1957, incorporating by reference the motion served on July 15, 1957, seeking to have the company held in contempt, and including a motion for leave further to amend the complaint, and another motion to have the motion for preliminary injunction set for hearing. Judge Knoch to whom the matter had been assigned was not sitting at that time, so that the motions were entered and continued to July 30, 1957. On that date Judge Knoch stated that on the basis of the complaint and answer it was his opinion that the motion for preliminary injunction should be denied (R. 100-102). He gave petitioner an opportunity, however, to submit a memorandum on the question (R. 96 and 102). At the same time he directed the parties to file briefs with respect to the matter of the proposed amendments to the complaint, and denied petitioner's motion to hold the company in contempt.

On August 1, 1957, petitioner filed his memorandum and on August 2, 1957, respondents filed a memorandum in answer thereto. On August 9, 1957, the district court

filed a memorandum and entered an order denying the motion for preliminary injunction (R. 116).

On the same day respondents filed their memorandum in support of their opposition to the proposed amendments to the complaint and their objections to the interrogatories which had been filed and on August 20, 1957, petitioner filed a brief with respect to the same matters.

On August 28, 1957, petitioner filed a notice of appeal from the order of August 9, 1957.

On August 29, 1957, petitioner served additional interrogatories. On September 7, 1957, petitioner served notice that he desired to take the depositions of an employee of the company and two of its directors on September 16, 1957. On September 10, 1957, respondents filed objections to the additional interrogatories. On September 12, 1957, respondents filed a motion for summary judgment asserting that there was no substantial issue of fact involved here supported by more than one hundred (100) pages of detailed factual information with respect to the petitioner and his claim, all of which, contrary to petitioner's assertion (Petition p. 13) were set forth under oath. On the next day respondents presented a motion asking the court to compel the petitioner to answer the motion for summary judgment and further asking the court to stay discovery pending disposition of the motion for summary judgment on the ground that since there was no substantial issue of fact involved here further discovery proceedings were unnecessary. The court ordered petitioner to answer the motion for summary judgment and motion to stay all discovery proceedings within ten days, took the motions under advisement, and further ordered that the depositions scheduled for September 16, 1957, be held in abeyance. On September 24, 1957, the petitioner filed

an answer to the motion to stay discovery but he has filed no answer to the motion for summary judgment to the present time.

Meanwhile petitioner proceeded in much the same fashion in the Court of Appeals. He filed a designation of record on September 16, 1957, and the clerk of the district court filed the transcript of record on September 30, 1957. Instead of filing the appendix and brief as required by the rules of the Court of Appeals for the Seventh Circuit, the petitioner, on October 14, 1957, filed with the Court of Appeals a motion which he titled "Motion for Hearing and for Preliminary Injunction or for a Writ of Mandamus and for other Relief" and a brief in support. We have filed herewith a certified copy of the answer of the respondents and the brief in support thereof filed in the Court of Appeals.

After hearing oral argument on this motion the Court of Appeals denied the motion and dismissed the appeal, *Schlosser* v. *Commonwealth Edison Co.*, 250 F. 2d 478. It is this action which this Court is now asked to review.

On December 11, 1957, before the opinion of the Court of Appeals was rendered, respondents asked and were granted leave to withdraw their objections to petitioner's second set of amendments to his complaint. On the same day respondents filed their answer to the complaint as amended.

Shortly after the mandate of the Court of Appeals was filed and the record was returned to the district court, the Executive Committee of that court reassigned this cause to Judge Miner who was recently appointed to that bench. On March 27, 1958, on the preliminary call of all matters assigned to him, he set for hearing on June 9, 1958, the matter of interrogatories and a rule on petitioner to answer respondents' motion for summary judgment.

REASONS FOR DENYING THE WRIT.

Petitioner sought by preliminary injunction to require respondents, who deny any obligation, to pay him before the question of liability could be determined. He cites no authority for this and cannot. No matter how petitioner beclouds and seeks to confuse the issue, this case involves no more than that as the Court of Appeals decided.

None of the cases cited by petitioner require exercise of this court's supervisory power under the circumstances here. Grant or denial of a preliminary injunction is a matter within the discretion of the trial judge. *Meccano, Ltd.* v. *John Wanamaker, New York*, 253 U.S. 136 (1920). No abuse of that discretion is shown here. Indeed, since neither petitioner's complaint nor his motion contained any allegations of irreparable harm which would be done him while the trial court determined the issue of liability, denial of the motion was the only proper course. *In re South State Street Bldg. Corporation*, 140 F. 2d 363, 366 (1943).

Both the district judge and the Court of Appeals heard arguments and considered briefs on the sufficiency of petitioner's claims. This was all the hearing to which he was entitled under the ordinary judicial processes. See *Gibbs* v. *Buck*, 307 U.S. 66, 76 (1939).

Certainly the doctrine of *LaBuy* v. *Howes Leather Company*, 352 U.S. 249 (1957) has no application here. There the reference to a master, in any event, was not the general practice. Here, the denial of a temporary injunction to compel payment of money by defendants who deny liability is itself the general rule.

CONCLUSION.

Because of petitioner's anomalous procedure below, the record in this Court is scant. We have filed herewith a certified copy of the docket of the clerk of the district court to support our Statement of the case. We respectfully submit that denial of the writ of certiorari will aid both the district court and counsel who are endeavoring to dispose of this matter in accordance with established judicial procedures.

Respectfully submitted,

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